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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

MEDICAL STAFFING NETWORK, INC., Plaintiff and Appellant, v. GARDENA PHYSICIAN'S HOSPITAL, INC. et al., Defendants; GARDENA ACQUISTIONS, GP, Objector and Respondent.	B213107 (Los Angeles County Super. Ct. No. YC049030)

APPEAL from an order of the Los Angeles County Superior Court, William G. Willett, Judge. Affirmed.

Fredman Lieberman, Howard S. Fredman, Marc. A. Lieberman and Alan W. Forsley for Plaintiff and Appellant.

Pearson Law Corporation, Joyce J. Pearson; Law Offices of Nate G. Kraut and Nate G. Kraut for Objector and Respondent Gardena Acquisitions, GP.

A judgment creditor moved to amend its default judgment against Gardena Physician's Hospital, Inc. (GPH) to add respondent Gardena Acquisitions, GP (GA) as a judgment debtor, on the grounds that GA was the alter ego or a mere continuation of GPH. The judgment creditor argued that an order in an unrelated action, which states that GA is "the successor" of GPH, served as collateral estoppel, and compelled the court's addition of GA as a judgment debtor in this action. The trial court denied the motion. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In May 2004, appellant Medical Staffing Network, Inc. (MSN) filed the underlying action for breach of contract and common counts against GPH. GPH, represented by counsel whom it later terminated, answered the complaint and served responses to discovery MSN propounded. GPH's answer was later stricken after it failed to obtain substitute counsel or to appear in response to an order to show cause and at a case management conference.

The clerk entered GPH's default in January 2005. In April 2005, MSN obtained a default judgment against GPH for approximately $126,000.

In March 2007, MSN moved to amend the default judgment against GPH in order to add GA, among others, as an additional judgment debtor based on the alter ego doctrine and principles of successor liability.[1] The trial court denied the motion in mid-June 2007.

In mid-July 2007, MSN filed an ex parte application seeking clarification from the trial court as to whether its denial of the motion to amend (1) was with prejudice, (2) precluded MSN from filing a separate fraudulent transfer action, or (3) precluded MSN from filing a new motion to amend the judgment based on an order in another action in which a court found GA to be the alter ego of GPH. The trial court responded that its ruling was without prejudice, and it did not give advisory opinions.

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[1] The other entities MSN sought to add as alter ego defendants to the judgment are not involved in this appeal.

On September 11, 2008, MSN filed a second motion to amend the default judgment to add GA as a judgment debtor. MSN argued that applying the doctrine of collateral estoppel, the trial court should amend the judgment to add GA as a judgment debtor. That argument was predicated entirely on a June 8, 2008 order issued in an unrelated action, *Olilang v. Gardena Physician's Hospital, Inc.* (Super. Ct. Los Angeles County, No. YC048667 (*Olilang* order),[2] in which the trial court granted a judgment creditor's request to name GA as a judgment debtor, having found GA was "the successor of the predecessor" GPH. The trial court found MSN failed to present sufficient evidence to support the requested order, and denied the motion. This appeal followed.

DISCUSSION

MSN contends the trial court erred by (1) failing or refusing to take judicial notice of the *Olilang* order, and (2) refusing to amend the default judgment to add GA as a judgment debtor, because the *Olilang* order definitively established that GA is the alter ego of GPH. We disagree.

1. Amending a judgment to add an alter ego defendant.

A trial court may use "all the means necessary" to carry its jurisdiction into effect. (Code Civ. Proc., § 187.) That statute grants the trial court the authority to amend a judgment to add additional judgment debtors on alter ego grounds. (*NEC Electronics Inc. v. Hurt* (1989) 208 Cal.App.3d 772, 778 (*NEC Electronics Inc.*); *Dow Jones Co. v. Avenel* (1984) 151 Cal.App.3d 144, 148.) The underlying rationale is that such an amendment does not constitute adding a new party, but is simply insertion of the name of the real actor, the original defendant's alter ego. (*McClellan v. Northridge Park*

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[2] MSN first presented this order in connection with its July 2007 request for clarification. MSN never explained why it waited over a year to file what is essentially the same motion to amend, although the first motion was based on unauthenticated excerpts of transcripts from a debtor's exam, while the second motion was premised entirely on the *Olilang* order. MSN did file a supplemental request for judicial notice of additional documents in connection with the operative motion to amend. However, with the exception of a copy of the court docket, MSN failed to lodge the documents for which it sought judicial notice, and it does not appear the court considered its supplemental request.

Townhome Owners Assn. (2001) 89 Cal.App.4th 746, 752 (*McClellan*); *Triplett v. Farmers Ins. Exchange* (1994) 24 Cal.App.4th 1415, 1420; *NEC Electronics Inc.*, *supra*, 208 Cal.App 3d at p. 778.)

To obtain an order adding an alter ego as an additional judgment debtor, the movant must meet two requirements. First, the moving party must demonstrate the new judgment debtor is the alter ego of the original defendant. Second, the movant must demonstrate the new judgment debtor controlled the prior litigation. (*McClellan*, *supra*, 89 Cal.App.4th at p. 752; *Triplett v. Farmers Ins. Exchange*, *supra*, 24 Cal.App.4th at p. 1421.) As one court has explained: "'This is an equitable procedure based on the theory that the court is not amending the judgment to add a new defendant but is merely inserting the correct name of the real defendant. [Citations.] "Such a procedure is an appropriate and complete method by which to bind new individual defendants where it can be demonstrated that in their capacity as alter ego of the corporation they in fact had control of the previous litigation, and thus were virtually represented in the lawsuit." [Citation.]' [Citations.]" (*McClellan*, *supra*, 89 Cal.App.4th at p. 752.)

As a matter of due process, an amendment adding an alter ego defendant will not be permitted absent a showing that the nonparty participated in the defense of the underlying litigation. (*Motores De Mexicali v. Superior Court* (1958) 51 Cal.2d 172, 175–176; *Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 309.) In *Motores*, the Supreme Court held it would constitute a denial of due process to permit amendment of a default judgment to include nonparties who had not participated in the defense of the underlying action against a corporation alleged to be their alter ego. The Court explained: The nonparties "in no way participated in the defense of the basic action against [the corporation]. [They] did not have attorneys subsidized by them appearing and defending the action against the corporation now alleged to be their alter ego. Instead, the judgment was entered against [the corporation] strictly by default. . . . [¶] Further, the same facts . . . also indicate that an amendment to the judgment here to include [the nonparties] would constitute a denial of due process of law. (U.S. Const., 14th Amend.) That constitutional provision guarantees that any person against whom a

claim is asserted in a judicial proceeding shall have the opportunity to be heard and to present his defenses. [Citations.] To summarily add [the nonparties] to the judgment heretofore running only against [the corporation] without allowing them to litigate any questions beyond their relation to the allegedly alter ego corporation would patently violate this constitutional safeguard." (*Motores De Mexicali v. Superior Court*, *supra*, 51 Cal.2d at pp. 175–176, italics omitted.) The question of what constitutes sufficient control of the underlying litigation turns on the facts of each case. (See e.g., *Minton v. Cavaney* (1961) 56 Cal.2d 576, 581; *Alexander v. Abbey of the Chimes* (1980) 104 Cal.App.3d 39, 46.) "'Control of the litigation sufficient to overcome due process objections may consist of a combination of factors, usually including the financing of the litigation, the hiring of attorneys, and control over the course of the litigation.' [Citation.] Clearly, some active defense of the underlying claim is contemplated. [Citation]." (*NEC Electronics Inc.*, *supra*, 208 Cal.App.3d at p. 781.)

2. No showing that the court failed or was required to take judicial notice.

MSN asserts it made the requisite alter ego showing by virtue of its presentation of the *Olilang* order, of which it contends the trial court was required but failed to take judicial notice. MSN is mistaken.

Pursuant to Evidence Code sections 452, subdivisions (d) and (h), 453 and 454, MSN's request for judicial notice requested that the trial court take judicial notice of an order amending the judgment in the *Olilang* action to add GA as a judgment debtor, by which GA was deemed "the successor of the predecessor" GPH. In pertinent part, Evidence Code section 452 permits a court to take judicial notice of the "[r]ecords of . . . any court of this state," or "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (Evid. Code § 452, subds. (d) & (h).) MSN asserts that the trial court was required to take judicial notice of the *Olilang* order because (1) it notified adverse parties of the request for judicial notice, (2) provided the court with sufficient information to enable it to take judicial notice of the *Olilang* order, and (3) its request for judicial notice was not opposed. (Evid. Code §§ 453, 452, subds. (a) & (b).)

Not quite. First, MSN has made no showing that, simply because it did not issue an express ruling on the request, the trial court failed to take judicial notice of the *Olilang* order. As we read the record, the trial court did consider but rejected that order, properly concluding it had "no bearing on [its] decision."

Second, by MSN's logic, the mere fact that it filed a properly noticed, but unopposed, request for judicial notice was sufficient to require the court to take judicial notice of the truth of facts established by the *Olilang* order. We cannot agree. Although a court may take judicial notice of the fact that another trial judge made a particular finding of fact, the second court may not properly take judicial notice *of the truth* of factual findings made as to a disputed matter by the first court sitting as a trier of fact. (*Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1564–1565; *Plumley v. Mockett* (2008) 164 Cal.App.4th 1031, 1051; *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1265–1266; *Kilroy v. State of California* (2004) 119 Cal.App.4th 140, 147–148; *Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 885–886.)[3] "Even though judicial notice of the truth of facts asserted in documents in a court record, such as orders, . . . is usually appropriate, it is not appropriate for judicial notice to be taken of the truth of a factual assertion in a *court order*, such as a minute order, if that assertion of facts is *not* predicated upon the court's finding based upon an adversary hearing that involves the question of the existence or nonexistence of such fact. A litigant should not be bound by the court's inclusion in a court order of an *assertion of fact* that such litigant has *not* had the opportunity to contest or dispute." (*Sosinsky v. Grant, supra,* 6 Cal.App.4th at p. 1568, citing 2 Jefferson Cal. Evidence Benchbook (2d

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[3] Of course, collateral estoppel or res judicata may operate to prevent further litigation of an issue. However, the question of whether a factual finding is true is different than whether the truth of that factual finding may be litigated again. If applied, res judicata and collateral estoppel bar relitigation of a factual dispute even where that factual dispute was erroneously decided in the first instance. (See *Nakash v. Superior Court* (1987) 196 Cal.App.3d 59, 67 [res judicata]; *McClain v. Rush* (1989) 216 Cal.App.3d 18, 28–29 [collateral estoppel].)

ed. 1982) § 47.2 at p. 1759.) It simply does not follow from the fact that a trial court ruled in favor of party A instead of B, that A's testimony was necessarily true simply because a trial judge believed A over B. "[N]either a finding of fact made after a contested adversary hearing nor a finding of fact made after any other type of hearing can be indisputably deemed to have been a correct finding. . . . '[u]nder the doctrine of judicial notice, certain matters are assumed to be indisputably true, and the introduction of evidence to prove them will not be required.' (1 Witkin, Cal. Evidence (3d ed. 1986) § 80.) Taking judicial notice of the *truth* of a judge's factual finding would . . . be tantamount to taking judicial notice that the judge's factual finding must necessarily have been correct and that the judge is therefore infallible." (*Sosinsky v. Grant*, *supra*, 6 Cal.App.4th at p. 1568, italics added.) We agree with *Sosinsky*, and those courts that have adopted its well-reasoned analysis, that courts should "resist the temptation to do so." (*Ibid*.; see also *Plumley v. Mockett*, *supra*, 164 Cal.App.4th at pp. 1050–1051; *Laabs v. City of Victorville*, *supra*, 163 Cal.App.4th at pp. 1265-1266; *Kilroy v. State of California*, *supra*, 119 Cal.App.4th at pp. 147–148; *Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort*, *supra*, 91 Cal.App.4th at pp. 885–886.)

MSN has not shown that facts established to the satisfaction of the trial court that issued the order in the *Olilang* matter were undisputed. MSN presented only a single order from that action amending a judgment to add GA as a judgment debtor.[4] MSN failed to present any evidence to demonstrate the nature of that litigation or the context in which the ruling was issued in the *Olilang* action. We do not know whether the judgment against GPH in that action was obtained by default or after a contested trial. Apart from MSN's unsubstantiated assertions, nothing in the record reflects the circumstances that led to the issuance of the *Olilang* order. All that we may ascertain from that order is that, for reasons unknown, a judge found that GA is the "successor" of GPH. As discussed below, however, the general rule is that a successor entity is not liable for the debts of its

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[4] MSN recites the purported genesis of the *Olilang* order in its opening brief. However, MSN fails to cite to any evidence to substantiate its recitation, and the record reveals none. Accordingly, we will disregard MSN's representations.

predecessor. (*McClellan, supra,* 89 Cal.App.4th at p. 753.) MSN failed to demonstrate any exception to this rule.

In sum, we find no support for MSN's assertions that the trial court refused to take judicial notice of the *Olilang* order, or that it was required to do so. That order is not relevant here.

3. No collateral estoppel.

MSN also argues the default judgment should be amended to include GA as a judgment debtor, because the *Olilang* order satisfies the prerequisites of the doctrine of collateral estoppel.

Collateral estoppel bars relitigation of an issue if: 1) the issue is identical to one actually litigated and necessarily decided in a previous suit, 2) there was a final judgment on the merits, and 3) the party against whom the doctrine is asserted was a party, or in privity with a party, in the previous suit. (*Producers Dairy Delivery Co. v. Sentry Ins. Co*. (1986) 41 Cal.3d 903, 910.) The movant bears the burden of proving these criteria are met. (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341.) We must bear in mind that even where the requirements of collateral estoppel are satisfied, courts will not invoke the doctrine if considerations of public policy or fairness outweigh the doctrine's purposes as applied in a particular case (*id.* at pp. 342–343), or if the party to be estopped lacked a full and fair opportunity to litigate the issue in the prior proceeding. (*Zevnik v. Superior Court* (2008) 159 Cal.App.4th 76, 82; *Bostick v. Flex Equipment Co., Inc.* (2007) 147 Cal.App.4th 80, 97.)

The policy considerations that caution against invocation of collateral estoppel apply here, where MSN seeks to use the judgment in the *Olilang* matter, to which MSN was not a party, to peg GA for liability for the judgment against GPH. Use of collateral estoppel by a nonparty to prior litigation is potentially unjust and must be carefully scrutinized to determine that such use is proper. (*Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 829–830; *Parklane Hosiery Co., Inc. v. Shore* (1979) 439 U.S. 322, 326–333.)

We reject MSN's effort to give preclusive effect to the determination of issues in the *Olilang* action. The authority on which MSN relies, *McClellan, supra*, 89 Cal.App.4th at p. 746, is inapposite. In *McClellan*, a contractor, agreed to perform earthquake repair work for a condominium association (Peppertree). Peppertree failed to pay for the work. The contractor obtained an arbitration award against Peppertree and that judgment was confirmed by the trial court. (*Id*. at p. 749.) Earlier, bankruptcy counsel had recommended to Peppertree's board that it file for bankruptcy and start a new association, as the best course of action, given Peppertree's debts; the board complied. It formed Northridge Park Townhome Owners Association, Inc. (Northridge Park), a new corporation, which immediately became the homeowners association for the complex, and recorded new covenants, conditions and restrictions. (*Ibid*.)

The contractor moved to amend the judgment to add Northridge Park as a judgment debtor on the grounds it was merely a continuation of Peppertree and had been created to hinder, delay and defraud Peppertree's creditors. The contractor presented evidence to show that ""aside from the name, there is no difference whatsoever [between] [Peppertree] and Northridge Park. Northridge Park conducts the same business, collects the same revenues, operates through the same Board of Directors, has the same management company and presides over the same Condominiums, as did [Peppertree].'" (*Id*. at p. 750.) That motion was granted. The appellate court affirmed, concluding the contractor presented sufficient evidence to show that Northridge Park was a mere continuation of Peppertree, fraudulently created in order to escape Peppertree's debts. (*Id*. at pp. 755–756.) The court rejected Northridge Park's argument that it had no liability because it did not participate in the prior action. To the contrary, the court found the evidence established that, as "Northridge Park was a mere continuation of Peppertree under a different name. . . . [i]t cannot be heard to complain that because it did not exist at the time the arbitration award was entered, its interests were not represented in the underlying action." (*Id*. at p. 757.)

In contrast to *McClellan*, MSN made no showing that GA's interests were aligned with GPH or represented in the *Olilang* action. MSN did no more than present a single-

sentence order that says GA is GPH's "successor." Whether or not that bare fact is true, the "general rule is 'where one corporation sells or transfers all of its assets to another corporation, the latter is not liable for the debts and liabilities of the former unless (1) the purchaser expressly or impliedly agrees to such assumption, (2) the transaction amounts to a consolidation or merger of the two corporations, (3) the purchasing corporation is merely a continuation of the selling corporation, or (4) the transaction is entered into fraudulently to escape liability for debts. [Citations.]'" (*McClellan*, *supra*, 89 Cal.App.4th at p. 753, italics omitted.) MSN presented no evidence to satisfy an exception to this rule that GA is not liable for its predecessor's debt.

Nor did MSN present evidence to show that GA had control of or was represented in the litigation against GPH sufficient to overcome the due process concerns articulated in *Motores de Mexicali v. Superior Court*, *supra*, 51 Cal.2d at p. 172. MSN asserts only that GA is GPH's alter ego. Even if we were to agree MSN has shown that GA is GPH's alter ego, this is only the first of two requirements to amend the judgment. MSN failed to satisfy the second requirement: it did not show that GA controlled or was represented in the litigation against GPH. (*McClellan*, *supra*, 89 Cal.App.4th at p. 752; *NEC Electronics Inc.*, *supra*, 208 Cal.App.3d at p. 778.)

MSN insists it established the second requirement. It asserts that through its predecessor GPH, GA took advantage of an opportunity to actively litigate the underlying action. The record reflects that GPH, initially represented by counsel, answered the complaint and responded to discovery. However, several months into the litigation and after it had terminated its counsel, GPH's answer was stricken when it failed to retain new attorneys or to appear in response to court orders. This evidence is not sufficient to establish that GA was either represented in or that it controlled the underlying litigation. MSN presented no evidence of the factors necessary to establish GA's control, i.e., that it financed the litigation, hired counsel, or participated actively in defending the underlying claims. (See *NEC Electronics Inc.*, *supra*, 208 Cal.App.3d at p. 781.) There is some indication that GA and GPH have the same chief executive officer and that several members of GPH's board are also members of the GA Board. However, absent a

showing that these individuals were actively involved in defending litigation, control is not established. It is not enough to show that an executive or board member knew of the litigation between MSN and GPH for, as one case observed, "[s]urely every chief executive officer of a corporation is cognizant of claims asserted against the corporation." (*Ibid.*) To overcome the due process concerns, MSN must demonstrate that GA engaged in an active defense of the underlying claim. (*Minton v. Cavaney*, *supra*, 56 Cal.2d at p. 581.) There is no evidence in this record that any representative of GA was actively involved in the defense of the underlying claims while they were at issue.

MSN also contends GA had a chance to litigate the motion to amend in the *Olilang* action, because the court in that action found it was the successor to GPH, with whom its interests are purportedly aligned. From that assertion alone, MSN maintains GA's interests were represented in the underlying litigation. However, as discussed above, MSN produced no evidence to support its contention that GA is either the mere continuation or the alter ego of GPH. To overcome the rule that a successor entity is not liable for its predecessor's debts, more must be shown than that the new entity is the successor to an existing judgment debtor. (*McClellan*, *supra*, 89 Cal.App.4th at p. 753.) Moreover, MSN proferred no evidence to reflect the context in which the *Olilang* order was obtained, or that GA actually had an opportunity to litigate the motion to amend in that action. MSN's motion to amend was properly denied.

DISPOSITION

The order is affirmed. Gardena Acquisitions, GP is awarded its costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

MALLANO, P. J.

CHANEY, J.